NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 20 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JUAN PEREZ-GONZALEZ, Defendant - Appellant.	No. 05-50789 D.C. No. CR-05-00182-BTM MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted September 15, 2006[**]
Pasadena, California

Before: WALLACE, O'SCANNLAIN, and WARDLAW, Circuit Judges.

Perez-Gonzalez appeals from his conviction under 8 U.S.C. § 1326 and his sentence. We have jurisdiction pursuant to 18 U.S.C. §§ 1291 and 1372, and we affirm.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Perez-Gonzalez argues that the prosecutor committed misconduct in the closing argument by allegedly shifting the burden of proof and depriving Perez-Gonzalez of the reasonable doubt standard. We review for harmless error. *United States v. Weatherspoon*, 410 F.3d 1142, 1150 (9th Cir. 2005). We have held that reasonable inferences that go beyond the actual evidence are permissible in closing arguments. *See United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995). The record indicates that the prosecutor's statements were reasonable inferences and rhetorical questions that did not shift the burden of proof. *See also United States v. Quintana-Torres*, 235 F.3d 1197, 1200 (9th Cir. 2000) ("a reasonable juror may well infer that the alien had the intention to be here when the alien is discovered at any location in the country other than the border. Such a conclusion is not a presumption of law. It is circumstantial proof that is convincing unless explained away"). Since no prosecutorial misconduct occurred, there was no error.

Next, we review de novo the district court's refusal to dismiss the indictment based on alleged instructional errors to the grand jury. *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002). Perez-Gonzalez urges us to adopt the dissent in *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005) (en banc), and hold that the grand jury instructions in his case constituted structural error. Since "a three-judge panel may not overrule [the binding precedent of our circuit] absent

intervening Supreme Court or en banc authority," *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005), we are bound to follow our en banc decision in *Navarro-Vargas*.

Finally, Perez-Gonzalez unpersuasively argues that 8 U.S.C. § 1326 is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be limited to its facts. We review de novo the argument that Perez-Gonzalez's sentence violates *Apprendi*. *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002). Perez-Gonzalez asserts that a majority of justices now believe that *Almendarez-Torres* was incorrectly decided, and therefore we should hold that the district court erred in increasing his sentence based on a prior conviction that was neither admitted nor submitted to a jury. We considered and rejected this argument in *United States v. Weiland*, 420 F.3d 1062, 1080 n.16 (9th Cir. 2005); *see also United States v. Almazan-Becerra*, Aug. 1, 2006 U.S. App. Lexis 19352, *13-14 (9th Cir. 2006).

Additionally, we previously held that the Court's decision in *Apprendi* has not altered the constitutionality of the enhancement under 8 U.S.C. § 1326(b). *See Rodriguez-Lara*, 421 F.3d 932, 949-50 (9th Cir. 2005). In *United States v. Ochoa-Gaytan*, we held that *Apprendi* "unmistakably carved out an exception for 'prior convictions' that specifically preserved the holding of *Almendarez-Torres*." 265

F.3d at 845-46, quoting *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000).

AFFIRMED.